In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1559

FAIRVIEW NURSING HOME, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. The Board found that, during a union organizing drive between January and March 1972, petitioner violated Section 8(a)(1) of the National Labor Relations Act by threatening its employees with discharge for participating in union activities, and by engaging in, and creating the impression of, surveillance of those activities (A. 846-848, 865-866).[1] The Board also found that petitioner violated Sections 8(a)(3) and (1) of the Act by discharging employee Ola Veneziano, whom it suspected was the "head of the Union" (A. 841, 851; 242), and by discharging, on March 11, 1972, 43 employees who had signed union authorization cards (A. 849-850, 851).

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[1] "A." references are to the printed two-volume appendix to the briefs filed in the court below.

The Board's order requires petitioner, *inter alia*, to reinstate the discriminatorily discharged employees, with backpay. If reinstatement is not possible, the order requires petitioner to pay backpay to those employees until they obtain substantially equivalent employment (A. 852-853, n. 37, 866).

On December 12, 1973, the court of appeals summarily enforced the Board's order (Pet. App. 18). On February 25, 1974, the court granted petitioner's motion to supplement the record (Pet. App. 22).[2] But, on March 11, 1974, the court denied its petition for rehearing (Pet. App. 21), and, on March 19, 1974, its motion for leave to file a second petition for rehearing.

2. Petitioner contests the Board's statutory jurisdiction, raises several procedural contentions, and questions the propriety of the Board's remedial order and the sufficiency of the evidence supporting the Board's unfair labor practice findings. None of petitioner's contentions presents an issue warranting review by this Court.

(a) Petitioner contends that the court of appeals erred in permitting its enforcement decree to stand notwithstanding that the additional evidence which the court had included in the record "clearly reveals that the Decision and Order of the National Labor Relations Board is no longer supported by credible evidence of the Record" (Pet. 3). But, the additional evidence was irrelevant to the Board's unfair labor practice findings. The bulk of the evidence is designed to show that the employees who were discharged on March 11, 1972, may have provided proper grounds for discharge by reporting for work late or by striking to force the reinstatement of lawfully discharged employees. However, the facts, as found by the

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[2]The court, on November 23, 1973, had denied petitioner's motion to remand the case to the Board to adduce additional evidence.

Board (A. 849-850), show that the employees were not discharged for these reasons, but because they had signed union cards.[3]

It is not relevant to this proceeding whether Public Employees Organizing Committee, which originally organized petitioner's employees, was defunct or replaced by another union (see A. 839, n. 6) because the Board's order does not confer representative status, upon, or require petitioner to bargain with, any particular labor organization.

(b) Petitioner errs in asserting (Pet. 9) that there was no basis for the Board's assumption of jurisdiction. The Board based its assertion of jurisdiction on the undisputed facts that petitioner, a licensed nursing home, "received gross revenues in excess of $400,000, $86,000 of which were derived from Medicaid payments by the Federal Government," and purchased goods at the approximate rate of $1,400 annually from an Alabama supplier who purchased them directly from outside the state (A. 838; 10-11, 19). These facts were a sufficient basis for Board jurisdiction under established principles. *National Labor Relations Board* v. *Reliance Fuel Corp.*, 371 U.S. 224, 226-227. See, also, *National Labor Relations Board* v. *Aurora City Lines*, 299 F. 2d 229, 231 (C.A. 7); *Von Solbrig Hospital, Inc.* v. *National Labor Relations Board*, 465 F. 2d 173, 174 (C.A. 7).

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[3]Moreover, the protest of a lawful discharge is activity protected by Section 7 of the Act. See *National Labor Relations Board* v. *John S. Swift Co.*, 277 F. 2d 641, 646 (C.A. 7).

(c) On no firmer footing is petitioner's complaint that the Administrative Law Judge improperly denied its motions to sequester witnesses (Pet. 6-9), to continue the hearing (Pet. 4), and to dismiss the proceeding (Pet. 4-5). The disposition of these matters rests largely in the discretion of the trier of fact. Moreover, even if error were committed, petitioner has made no showing of prejudice. It is long settled that "[h]e who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted." *Palmer* v. *Hoffman,* 318 U.S. 109, 116; *National Labor Relations Board* v. *Seine and Line Fishermen's Union of San Pedro,* 374 F. 2d 974, 981 (C.A. 9), certiorari denied *sub nom. Biazevich et al., dba M.V. Liberator, et al.* v. *National Labor Relations Board,* 389 U.S. 913.

(d) Petitioner's challenge to the Board's evidentiary findings (Pet. 11-15) relates primarily to the judge's credibility resolutions. Those resolutions are fully explained in his decision (A. 839, n. 7, 841, n. 8), and are reasonable. Contrary to petitioner's assertion (Pet. 11-12), the fact that the judge may have credited General Counsel witnesses where the testimony was in conflict "[does not] impugn the integrity or competence of a trier of fact." *National Labor Relations Board* v. *Pittsburgh Steamship Co.,* 337 U.S. 656, 659.

(e) Finally, petitioner contends (Pet. 12) that its backpay liability should have been terminated after September 22, 1972, when it allegedly ceased business operations and leased its property to a New York

company. Since petitioner failed to raise this objection in its exceptions to the Board, it is precluded, under Section 10(e) of the Act, 29 U.S.C. 160(e), from raising that objection before this Court. *Marshall Field & Co.* v. *National Labor Relations Board,* 318 U.S. 253, 255-256. In any event, the fact that petitioner may have ceased operations would not necessarily end its backpay liability. See *Golden State Bottling Co.* v. *National Labor Relations Board,* No. 72-702, December 5, 1973, sl. op., p. 18: "With respect to the offending employer himself, it must be obvious that it cannot be in the public interest to permit the violator of the Act to shed all responsibility for remedying his own unfair labor practices by simply disposing of the business. If he has unlawfully discharged employees before transferring ownership to another, he should at least be required to make whole the dischargees for any loss of pay suffered by reason of the discharges until such time as they secure substantially equivalent employment with another employer," quoting from *Perma Vinyl Corp.,* 164 NLRB 968, 970.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1974.